IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL MISCELLANEOUS APPLICATION NO.207 OF 2005
AND
CRIMINAL MISCELLANEOUS APPLICATION NO.208 OF 2005

CRIMINAL MISCELLANEOUS APPLICATION NO.207 OF 2005

1. SHRI ROHIT MULL OF MUMBAI,
INDIAN INHABITANT, NOMINEE AND
EX-EMPLOYEE OF CADBURY(INDIA)LTD.,
HAVING HIS ADDRESS FOR ALL OFFICIAL PURPOSES
AT CADBURY HOUSE, 19, BHULABHAI DESAI ROAD,
MUMBAI 400 026.

2. CADBURY INDIA LIMITED,
A COMPANY INCORPORATED UNDER
INDIAN COMPANIES ACT, 1913,
AND HAVING ITS REGISTERED OFFICE
AT CADBURY HOUSE, 19, BHULABHAI DESAI ROAD,
MUMBAI 400 026. ..... APPLICANTS

VERSUS

THE STATE OF GOA AT THE INSTANCE OF
SMT. IVA FERNANDES, PUBLIC ANALYST,
DIRECTORATE OF FOOD AND DRUGS
ADMINISTARATION, PANAJI-GOA. ..... RESPONDENT

CRIMINAL MISCELLANEOUS APPLICATION NO.208 OF 2005

1. SHRI ROHIT MULL OF MUMBAI,
INDIAN INHABITANT, THE NOMINEE
OF CADBURY(INDIA)LTD.,
HAVING HIS ADDRESS FOR ALL OFFICIAL PURPOSES
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VERSUS

THE STATE OF GOA AT THE INSTANCE OF
SHRI R.R. KORDE, FOOD INSPECTOR,
C/o. THE DIRECTORATE OF FOOD AND
DRUGS ADMINISTRATION (GOA),
PANJIM, GOA. ..... RESPONDENT

SHRI KIRTI PAREKH, ADVOCATE FOR THE APPLICANTS

SHRI S.N. SARDESSAI, PUBLIC PROSECUTOR FOR THE RESPONDENT.

CORAM : **N. A. BRITTO, J.**

DATE : **29/11/2005 & 30/11/2005**

ORAL JUDGMENT

The short point for consideration in these petitions, filed under Section 482 of the Code of Criminal Procedure, 1973, is whether the prosecutions launched by the Food Inspectors against the petitioners should be allowed to continue on the face of the grievance of the petitioners that their right of having a second report from the Central Food Laboratory, in terms of Section 13(2) of the Prevention of Food Adulteration Act, 1954 (Act, for short) and which overrides the report of public analyst, has been frustrated by the Food Inspectors.

2. These petitions are being disposed of by this common judgment since the point of law involved in both is common, though the facts are slightly different.

3. The petitioner no.2 is a registered company and the petitioner no.1 is a nominee of the said company nominated under Section 17(2) of the Act. Both the petitioners are accused nos. 2 & 1 in Criminal Case no. 726/2004/A before the Court of JMFC, Panaji and accused nos. 9 & 8 in Criminal Case no. 1422/S/2004/B before the JMFC, Mapusa.

4. In the first case the Complainant - Food Inspector purchased from the Vendor/A-4 from Marfel Mini Supermarket owned by A-5 situated at Kamat Kinara, Ground floor, Building No.5, Caranzalem, after following the prescribed procedure, three packets of (1) composite chocolate (fruit and nut) and (2) 3 packets of composite chocolate (crackle) which were in a cooler kept for sale to the public. The fruit and nut chocolates, as per label had the following on the label: PKD:T25T3T2.06/03 Best Before 06/04 etc. and the crackle chocolates had: PKD:T20R313.05/03 Best Before 05/04 etc. The said chocolates were packed in three parts and one part was sent to the Public Analyst who by report dated 15/12/2003 opined that the sample of composite chocolate (fruit and nut) analysed showed presence of living larva and therefore was unfit for human consumption and hence was adulterated as per the Act. As far as the sample of composite chocolate (crackle), the Public Analyst by report of the same date opined that the sample showed the presence of living larva and webs and therefore was unfit for human consumption and hence was adulterated. The Complaint was filed on 17/6/04 and a notice dated 25/6/04 as required under Section 13(2) was

sent to the petitioners by the Local Health Authority which the petitioners received on 28/6/2004.

5. In the second case, the Complainant – Food Inspector purchased from vendor/A-4 from A-1 M/s. Kissan Provision stores, situated at Municipal market, Mapusa of which accused numbers 2 & 3 are partners, after following prescribed procedures, 3 bars of cadbury crackle, cadbury dairy milk chocolates with nut butterscotch and rice crisps having label:batch No. T08T3T3 PKD 02/03 Best Before 02/04 etc. and after following other procedures, divided and packed the said sample in three parts and one of the samples was sent to the Public Analyst on the same day and the remaining two parts were sent to Local Health Authority. The Public Analyst vide his report dated 17/10/2003 opined that the sample on analysis showed presence of living larva and therefore could not be considered fit for human consumption and hence adulterated as per the Act. The complaint was filed on 19/8/2004 and a notice dated 23/8/04 as required under Section 13(2) of the Act was sent to the petitioners which notice the petitioners received on 26/8/04.

6. There is no dispute that, as far as the sample of composite chocolate (fruit and nut) is concerned the notice sent under Section 13(2) of the Act was received by the petitioners two days before the 'Best Before Date' printed on the label and as far as the samples of composite chocolates

(crackle) and the sample of cadbury crackle with nut butter scotch and rice crisps was sent much after the 'Best Before Date'. This 'Best Before Date' shown on the label is in terms of Rule 32 (i) of the Prevention of Food Adulteration Rules, 1955 and in terms of Explanation VII below the said Rule it means the date which signifies the end of the period under any stated storage conditions during which the product will remain fully marketable and will retain any specific qualities for which tacit or express claims have been made. The explanation also states that however, provided that beyond the date the food may still be perfectly satisfactorily.

7. There is no dispute that the said chocolates were manufactured by the Petitioner-Company.

8. The Complainant - Food Inspectors having filed the said complaints before the respective Courts for offences punishable under Sections 7/16 of the Act, the learned JMFCs were pleased to issue process against all the accused, but the Petitioners challenged the order issuing process against them in revision before the Court of Sessions and the learned Additional Sessions Judge by separate orders dismissed the revision applications, inter alia, observing that it would not be proper and justifiable to quash and set aside the prosecution as it would be premature at this stage to predicate as to what would have been the report of the Central Food Laboratory in case at the request of the present petitioners the sample was

sent for analysis in terms of Section 13(2) of the Act.

9. Section 13 of the Act regarding which the controversy revolves in these petitions deals with the report of Public Analyst, and Subsection (1) thereof provides that the public analyst shall deliver, in such form as may be prescribed, a report to the Local Health Authority of the result of the analysis of any article of food submitted to him for analysis. Sub-section (2) which is far more important, reads as follows :

On receipt of the report of the result of the analysis under Sub-section (1) to the effect that the article of food is adulterated, the Local (Health) Authority shall, after the institution of prosecution against the person from whom the sample of the article of food was taken and the person, if any, whose name, address and other particulars have been disclosed under Section 14(A), forward, in such manner as may be prescribed, a copy of the report of the result of the analysis to such person or persons, as the case may be, informing such person or persons that if it is so desired, either or both of them may make an application to the court within a period of 10 days from the date of receipt of the copy of the report to get the sample of the article of food kept by the Local (Health) Authority analysed by the Central Food Laboratory.

10. Sub-section 2(A) to Sub-section 2(E) may not be relevant for our purpose but Sub Section (3) which is next in importance, states as follows:

(3) The certificate issued by the Director of the Central Food Laboratory under Section 2(B) shall supersede the report given by the Public Analyst under Subsection (1).

11. Needless to observe the Certificate of the Director of Central Food Laboratory, which laboratory in this case is stated to be situated at Gaziabad (UP) would have superseded the opinion given by the Public Analyst in terms of Subsection (3) of Section (13) of the Act.

12. At the time of hearing, learned Counsel Shri Parekh, on behalf of the petitioners, has tried to explain in the petition as well as at the time of arguments that the batch number shown on the label gives the details of the place, of the week, of the day, of the year, of the shift of manufacture of the chocolates. It has been submitted on behalf of the petitioners that in two of the cases the notice under Section 13(2) was sent by the Local Health Authority after the date 'Best Before Date' had expired and in one case it was received by the petitioners only on 28/6/04 and considering that only two days were left for 'Best Before Date' to expire and the time involved which would be required to come to Goa, make an application to the court, send the notices to the local health authority to send the sample to the court and than again dispatch the sample to Gaziabad in UP, would have certainly made it impossible for the petitioners to exercise their right even assuming that they could notionally have exercised the said rights. It is a submission of the

petitioners that the Complainant delayed in filing the complaint and than the local health authority in giving the notices to the petitioners, for the petitioners to exercise their option to get the sample analysed by the Central Food Laboratory at Gaziabad and thereby denied the very right of the petitioners and in such a situation no purpose would be served in proceeding with the prosecutions which are bound to fail. Shri Parekh has placed reliance on the case of ***Municipal Corporation of Delhi*** *Versus* ***Ghisa Ram*** (1975, Prevention of Food Adulteration case 186) and on an unreported judgment in the very case of these Petitioners in Criminal Writ Petition no. 1632/1998 decided at Mumbai on 7/10/04. Reliance has also been placed on the cases of ***The State of Maharashtra*** *Versus* ***Murlidhar Pandurang Kalekar*** (1977 (1) PFAC (1)) and ***The State of Maharashtra*** *Versus* ***Laxman N. Khamkar*** (1977(1) PFAC 131).

13. On the other hand, Shri Sardessai has submitted that the petitioners herein are being prosecuted, for serious offences and their case/s are not fit enough to invoke extraordinary jurisdiction of this Court under Section 482 of the Code. In support of his submissions Shri Sardessai has placed reliance on the case of ***Zandu Pharmaceutical Works Ltd. & Others*** *Versus* ***Mohd. Sharaful Haque and another*** (2005 (1) SCC 122) wherein the Supreme Court has noted that though inherent jurisdiction is wide, it has to be exercised sparingly, carefully and with caution and only when such exercise is justified by the tests specifically laid down in Section 482 mainly

it has to be exercised *ex debito justitiae* to prevent abuse of process of court but not to stifle legitimate prosecution. Shri Sardessai has also submitted that incase there was a delay in filing the Complaints and after filing the Complaints to send the notice to the petitioners and other accused under Section 13(2) of the Act it was because the Complainant took time to obtain particulars from the accused and to complete the investigations as well as to obtain consent from Local Health Authority. Shri Sardessai has submitted that the Petitioners could always seek their discharge at appropriate stage before the learned JMFCs.

14. The submissions such as these made by the learned P.P. Shri Sardessai have been already taken care of by the Honourable Supreme Court in the case of ***M/s. Pepsi Foods Ltd. And another*** *Versus* ***Special Judicial Magistrate and Others*** (1998 SC 128) which is again a case under Sections 7/16 of the Act and the Section 482 of the Code. In this case the Supreme Court stated that it is no comfortable thought for the appellants to be told that they could appear before the Court which is at a far place in the Gaziapur in the State of UP, seek their release on bail and then to either move an application under Section 245(2) of the Code or to face trial when the complaint and the preliminary evidence recorded makes out no case against them. It is certainly one of those cases where there is an abuse of the process of the law and the Courts and the High Court should not have shied away in exercising its jurisdiction. Provisions of articles 226 and 227 of the

Constitution and Section 482 of the Code are devised to advance justice and not to frustrate it. The High Court should not have adopted such a rigid approach which certainly led to miscarriage of justice in the case. Power of Judicial review is discretionary but this was a case where the High Court should have exercised it.

Date : ***30/11/2005***

15. By now there is unanimity of judicial opinion that when a valuable right is lost to the accused to get the sample re-analysed from the Director, Central Food Laboratory, he can very well claim that prejudice has been caused to him and this is because the report of the Director, Central Food Laboratory, supersedes that of the Public Analyst. Section 13(2) of the Act confers a valuable right on the seller of the article of food to get the sample analysed by the Central Food Laboratory, and while it is in a condition fit for such analysis and in our case that would be on or before the 'Best Before Date'. An effort has been made on behalf of the petitioners by referring to the batch numbers to say that one year from the date of manufacture got expired on 16/6/04, 16/5/04 and 17/2/04 and to say these were the Best Before Dates, in the case of the said three purchases. What the petitioners can read into the said batch number, an ordinary prudent customer will not be in a position to read. For an ordinary customer when the label indicates that the product is best before, for example 05/04 he would understand that it could be used as best before the last date of that

particular month. That the delay was occasioned on account of time taken by the Complainants to complete the investigations or to obtain the consent from the Local Health Authority is poor consolation to the petitioners who are accused in these cases. Accused could not complain of delay in case the delay did not defeat their statutory right. If there is delay in filing the case and further delay in furnishing the report of the Public Analyst, the seller or manufacturer, etc. of the food article in question would not be in a position to exercise his valuable right under Section 13(2) of the Act in an effective manner. In the case at hand, in the second and third purchases made, notice was given much after the Best Before Dates and in the first case just before 2 days of expiry of Best Before Date, thus making it impossible for the petitioners and or the other accused to have effectively and meaningfully exercise their right under Section 13(2) of the Act before the last Best Before Dates. Since the statutory right given to the accused under Section 13(2) of the Act is fundamental to the very defence of the accused denial of such a right is bound to cause prejudice to the accused and thus lead to the acquittal of the accused and as such any continuation of prosecution in such situation would turn out to be a persecution and as such as abuse of the process of the court and therefore requires to be interfered with by this court in its extraordinary jurisdiction under Section 482 of the Code.

16. The apex court in the case of ***Municipal Corporation of Delhi*** *Versus* ***Ghisa Ram*** (1975 PFA Cases 186) has stated that there can be no

doubt that Sub-section (2) of Section 13 of the Act confers a right on the accused vendor to have the sample given to him examined by the Director of the Central Food Laboratory and to obtain a certificate from him on the basis of the analysis of that sample. It is when the accused exercises this right that a certificate has to be given by the Director of the Central Food Laboratory and that certificate than supersedes the report given by the public analyst. If, in any case, the accused does not choose to exercise this right, the case against him can be decided on the basis of the report of the Public Analyst. Difficulty, however, arises in a case where the accused does not exercise the right by making a request to the Court to send his sample for analysis to the Director of the Central Food Laboratory and the Director is unable to issue a certificate because of some reason, including the reason that the sample of the food article has so deteriorated and become decomposed that no analysis is possible. It appears to us that the valuable right is conferred by Section 13 (2) of the Act on the vendor to have the sample given to him analysed by the Director of the Central Food Laboratory it is to be expected that the prosecution will proceed in such a manner that that right will not be denied to him. The right is a valuable one, because the certificate of the Director supersedes the report of the Public Analyst and is treated as conclusive evidence of its contents. Obviously, the right has been given to the vendor in order that, for his satisfaction and proper defence, he should be able to have the sample kept in his charge analysed by a greater expert whose certificate is to be accepted by the Court as conclusive evidence. In a case where there is

denial of this right on account of the deliberate conduct of prosecution, we think that the vendor, in his trial, is so seriously prejudiced that it would not be proper to uphold his conviction on the basis of the report of the Public Analyst, even though that report continues to be evidence in the case of the facts contained therein.

17. The Supreme court went on further to observe that, "we consider that the principle must however be applied to cases where the conduct of the prosecution has resulted in the denial to the vendor of any opportunity to exercise this right. Different considerations may arise if the right gets frustrated for reasons for which the prosecution is not responsible. The report of the Public Analyst, does not cease to be good evidence merely because a certificate from the Director of the Central Food Laboratory cannot be obtained. The reason why the conviction cannot be sustained is that the accused is prejudice in his defence and is denied a valuable right of defending himself solely due to the deliberate acts of the prosecution."

18. In the case of ***Gela Hira Rabari*** *Versus* ***S.V. Pandya and Another*** (AIR 1970 Gujarat 235), relied in the Judgment of this Court dated 7/10/2004, the Gujarat High Court referred to the case ***Municipal Corporation of Delhi*** *Versus* ***Ghisa Ram*** (supra) decided on 23/11/1966 and also reported in AIR 1967 SC 970 and also to another unreported judgment of the Apex Court dated 7/10/2004, wherein the view expressed by the

Supreme Court in ***Ghisa Ram*** was followed and the Gujarat High Court observed that the delay in instituting a prosecution under the Act can be said to deprive the accused of the right under Section 13(2) of the Act and to render his conviction illegal, it must be shown (i) that prejudice was caused to the defence (ii) that sample had deteriorated by the time the summons was received by the accused; and (iii) that the accused had utilised the right under Section 13(2) of the Act, of sending the sample to the Director of Central Food Laboratory.

19. The Supreme court again in the case of ***Chetumal*** *Versus* ***State of Madhya Pradesh And another*** (1981 (3) SCC 72) reiterated that under Section 13(3) of the Act, the report of the Public Analyst stood superseded by the certificate issued by the Director of the Central Food Laboratory. Having been so superseded, the report of the Public Analyst, cannot, therefore, be relied upon to base a conviction. The certificate of the Director of Central Food Laboratory having been excluded from consideration because of the tampering of the seals, there was really no evidence before the court on the basis of which the appellant could be convicted. The court could not fall back on the report of Public Analyst as it had been superseded.

20. I do not think it is necessary to refer to other cases decided by this Court and relied upon, on behalf of the petitioners to which reference has already been made.

21. In this case the delay in filing the Complaint and sending the notice under Section 13(2) of the Act belatedly is entirely attributable to the Complainants which has resulted in defeating a valuable right of the accused, a right which is fundamental to their defence. The Ld. Additional Sessions Judge might have been right in observing that no time limit was prescribed for the Local Health Authority to send the copy of the report of the result of the analysis to the person from whom the sample of the article was taken, but the complainant as well as the local health authority had to ensure that a statutory right given to the accused would not be frustrated. As already noted in the case of the two of the purchases the notice given to the petitioners/accused was given much after the 'Best Before Date' and in cases of the third purchase, the notice was given just before two days of the said 'Best Before Date' thereby making it impossible for the Petitioners, even if they were stationed in this State, to exercise the said right of making an application to the Court concerned to get the sample of the article of food kept by the Local Health Authority analysed by the Central Food Laboratory. Even if the petitioners had made such an application immediately after receiving the said report of the Public Analyst, it would have been impossible for the petitioners to have exercised the said right given to them in such a short period. In other words, the Complainants made it impossible for the accused to exercise the right under Subsection 2 of Section 13 of the Act. In such a situation no conviction against the accused would be possible and therefore no useful purpose would be served by continuing with the

prosecutions under Sections 7/16 of the Act. The law laid down by the Apex Court in ***Ghisa Ram*** (supra) and ***Chetumal*** (supra) is clearly applicable to the facts of these case. The The Complainants can only blame themselves and not the accused for the delay caused in filing the complaints and or issuing the notice to the accused alongwith the report of the Public Analyst to enable the accused to exercise their right under subsection 2 of the Section 13 of the Act. Continuation of the prosecution would be, when conviction will be impossible, nothing but a farce and an abuse of the process of the court.

22. In view of the above discussion, the process issued against the petitioners/accused by the learned JMFCs at Panaji and Mapusa in the said two cases deserves to be quashed and set aside. Since the notices sent under Subsection 2 of Section 13 of the Act is common to all the accused in each of the cases, in my view, it would be in the interest of justice that the benefit of this Judgment is also extended to the other accused in the said two cases who did not choose either to file revision applications before the Court of Sessions or did not choose to approach this Court. Order accordingly.

N.A. BRITTO, J.

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